

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT FOR THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK,
AND THE HONORABLE STEFANY
MILEY, DISTRICT JUDGE,
Respondents,

and

AMERICAN BROADCASTING
COMPANIES, INC.; THE ASSOCIATED
PRESS; CABLE NEWS NETWORK, INC.;
CHESAPEAKE MEDIA I, LLC, D/B/A
KSNV-TV; LOS ANGELES TIMES
COMMUNICATIONS, LLC; THE NEW
YORK TIMES COMPANY; SCRIPPS
BROADCASTING HOLDINGS, LLC
D/B/A KTNV-TV; WP COMPANY LLC
D/B/A THE WASHINGTON POST AND
LAS VEGAS REVIEW-JOURNAL,
Real Parties in Interest.

Electronically Filed
Jun 22 2018 10:44 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO.: 76023

DISTRICT COURT CASE NO.:
A764030; A764169-W

**REAL PARTY IN INTEREST LAS VEGAS REVIEW-JOURNAL'S
RESPONSE TO PETITIONER'S MOTION TO STRIKE LAS VEGAS
REVIEW-JOURNAL'S RESPONSE TO PETITIONER'S EMERGENCY
PETITION FOR WRIT OF PROHIBITION**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves access under the Nevada Public Records Act (the “NPRA”) to 1 October records. After the district court issued orders (the “Disclosure Orders”), the Las Vegas Metropolitan Police Department (“Metro”) appealed. This Court declined to stay the Disclosure Orders during the pendency of the appeal. Metro filed an Emergency Petition asking this Court to take the extreme step of divesting the district court of authority over the Disclosure Orders.

As Metro concedes, Real Party in Interest, the Las Vegas Review-Journal (the “LVRJ”) timely filed its response to the Petition before 4 p.m. on June 18, 2018. Rather than address its substance, Metro now seeks to strike the Response on a technical basis. In its June 19, 2018 Motion to Strike (the “Motion” or “Mot.”), Metro contends that, because it did not receive a courtesy copy until thirty-six (36) minutes after the 4 p.m. service deadline, the Court should strike the timely-filed Response. The undersigned, who takes her obligations pursuant to this Court’s orders and rules very seriously and worked diligently to submit a timely and comprehensive brief, apologizes to the Court and Metro for not serving earlier.

However, the LVRJ respectfully asks this Court to resolve the Petition on its merits and not a technicality.¹ Resolution on the merits is an important policy goal

¹ Metro did not, and cannot, assert that it was prejudiced by the thirty-six minute

recognized by this Court (*see, e.g.*, NRAP 1(a)) and it is especially important here. As detailed in the Response, it is the LVRJ's position that granting Metro's Emergency Petition would serve as a *de facto* stay of the Disclosure Orders, would improperly interfere with the district court's inherent authority to oversee compliance with the Disclosure Orders, and would thus stymie transparency under the NPRA. Further, the LVRJ respectfully contends that this Court should not consider granting the extreme remedy of writ relief without the benefit of a response.

In addition to asking this Court to entirely ignore the Response, Metro argues that the LVRJ presents arguments and exhibits that should not be considered because they were not before the district court when it entered the June 13, 2018 Order (the "Status Check Order") that Metro seeks to enjoin. However, the items are pertinent to the core question raised in the Petition: whether Metro should be able to evade district court scrutiny regarding non-compliance with the Disclosure Orders. Further, writ appendices may include copies of "any other document that may be essential to understand the matters set forth in the petition." NRAP 21(a)(4). Likewise, the general rule against concurrent jurisdiction that Metro predicates its Petition on is based on judicial efficiency. Thus, the argument that the appeal is mooted is pertinent to whether this Court should grant relief.² And, unlike an appeal,

delay. Indeed, the fact that Metro had time to file its Motion to Strike evidences that it was not prejudiced in the least.

² Similarly, the LVRJ's argument that, as an alternative to the extreme relief sought

such arguments could not have been raised below because the question of whether a writ should issue was never before the district court.³ Neither the Response nor the Appendix should be stricken in whole, or in part.

Finally, Metro asks that, if this Court rejects its Motion to Strike, it should be granted an extension to file its Reply. While the LVRJ does not object to a one-day extension, any further extension would be improper. The courtesy copy was provided a mere thirty-six minutes after the deadline. Metro was not prejudiced by the delay.⁴ Further, this Court has stayed the Status Check Order seeking information from Metro in advance of a status check that, prior to this Court's June 11, 2018 Order, was scheduled for June 19, 2018. Any further delays just postpone appropriate supervision of the Disclosure Orders.

II. LEGAL ARGUMENT

A. Metro's Motion Is Untethered to Any Basis for the Relief Sought.

Metro's Motion is devoid of law authorizing the main relief it seeks—striking filings and materials in writ proceedings. *See* NRAP 27(a)(2) (requiring that “[a]

by Metro, this Court could address any concerns via a stay is proper.

³ Further, Metro did not provide the LVRJ with a courtesy copy of its Opposition to the Motion for an Order to Show Cause and Status Check filed on May 25, 2018 (*see* Metro's Appendix to Emergency Petition Volume 5 Bates 943-970) until 6:59 a.m. on the morning of the May 29, 2018 hearing at issue in the Petition (and it was not received through the Eighth Judicial District electronic filing system until 2:00 p.m., after the hearing (*See* Addenda A and B).) Thus, the LVRJ could not file a reply to the jurisdictional arguments made therein.

⁴ It does not appear that Metro is in want of time to draft its reply since it had enough time to file its Motion to Strike.

motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.”). As an alternative to striking, Metro seeks an extension of the deadline to file its reply. Thus, the Motion to Strike is also a motion for an extension of time. Yet, Metro failed to comply with the requirements for such a motion. *See* NRAP 31(b)(3); *see also* NRAP (1)(2) (a “motion shall contain or be accompanied by any matter required by a specific provision of these Rules governing such a motion...”). Accordingly, Metro’s “gotcha” Motion to Strike should itself be denied on procedural grounds alone.

B. The Provided a Courtesy Copy In Advance of E-File Acceptance.

NRAP 25(a)(2)(B)(vi) provides that a filing is timely if, on or before the day of filing, it is “electronically transmitted to the court’s electronic filing system....” Here, the Court provided a specific time for filing (4 p.m. on June 19, 2018); the LVRJ submitted the Response via the electronic filing system before that deadline. Thus, as Metro concedes, the Response was timely. The undersigned represents that, because the Response was not accepted by 4 p.m. and, thus that service via the Master Service List was not effectuated, her office sent a courtesy copy to opposing counsel at 4:36 p.m. Again, the undersigned apologizes for not doing so earlier.

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C. This Court Should Resolve the Petition On Its Merits.

Metro's Motion to Strike fails to recognize this Court's policy in favor of resolving matters on their merits. NRAP 1 provides:

(c) Construction of Rules. These rules shall be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court.

NRAP. 1.⁵ Resolution on the merits is especially vital in this case for multiple reasons. First, Metro seeks extraordinary relief and the Court should consider the many reasons the LVRJ provided against doing so. Second, as detailed in the Response, the LVRJ contends that, if this Court grants the relief sought, it will further delay Metro's meaningful compliance with the Disclosure Orders. Thus, granting the Petition would undermine the purpose of the NPRA: fostering democratic principles through governmental transparency. NRS 239.001(1). Metro

⁵ See also, *e.g.*, *Lesley v. Lesley*, 113 Nev. 727, 734, 941 P.2d 451, 455 (1997) (Nevada has a basic underlying policy in favor of deciding cases on their merits), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 950 P.2d 771 (1997)); compare *Huckabay Props. v. NC Auto Parts*, 130 Nev. Adv. Op. 23, 322 P.3d 429, 437–38 (2014) (“While Nevada’s jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court’s decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals’ dismissals.”) Here, the LVRJ meaningfully endeavored to comply with this Court’s directives. It timely filed its Response, and then served it within thirty-six minutes of the deadline. It should not be stricken.

should not be able to further delay and avoid accountability on a technicality.

D. The Motion to Strike the Appendix Must Be Denied.

In asserting that the LVRJ's appendix is improper, Metro relies almost entirely on case law pertaining to appeals.⁶ However, this is a writ proceeding. Unlike NRAP 30, which governs appendices filed in conjunction with appellate briefs, NRAP 21 broadly permits parties to submit any documents that are relevant to the issues raised in a writ petition. NRAP 21(a)(4)⁷ specifically provides that an appendix to a writ petition "shall include a copy of any order or opinion, parts of the record before the respondent judge, corporation, commission, board or officer, ***or any other original document that may be essential to understand the matters set forth in the petition.***" NRAP 21(a)(4) (emphasis added).

Unlike appeals, writ petitions such as Metro's ask that this Court take the

⁶ See *Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal.") (cited at Mot. pp 3, 4); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52–53, 623 P.2d 981, 983–984 (1981) (new matters cannot be raised on appeal) (cited at Mot., p. 4); *Davis v. Packard*, 31 U.S. 41, 43–44 (1832) (same) (cited at p. 2); *Clack v. Jones*, 62 Nev. 72, 75, 140 P.2d 580, 581 (1943) (cited by Metro at Mot., p. 2 for the proposition that "[t]he record on appeal is made up of papers from the court below and may not be supplemented by papers to the Supreme Court"). Likewise, NRAP 10(a) (cited by Metro at pp. 2, 4) concerns documents to be submitted on appeal, not in a writ proceeding. Nev. Rev. App. P. 1(a) defines the "trial record" and Nev. Rev. App. P. 10(b) in turn explains, "[t]he Record on Appeal" is to include portions of the trial record.

⁷ While noted in a header (Mot., p. 1), Metro never discusses NRAP 21 in the body of its Motion, even though—unlike the material Metro does detail— NRAP 21 governs appendices in writ proceedings.

extraordinary step of intervening in ongoing district court proceedings. Thus, the record should not be limited to what Metro chose to include in its appendix. Nor should the record be frozen in time. In addition to requesting that this Court enjoin the district court from taking steps it never took, Metro’s Petition asks this Court to enjoin the district court from supervising Metro’s compliance with the NPRA Disclosure Orders at issue in this case. As demonstrated in the table below, the documents in the LVRJ’s appendix from RA 003-094 help inform the matters set forth in the proceeding and, thus, were properly included in the appendix pursuant to NRAP 21(a)(4). Metro does not show otherwise.⁸

Appendix Item	Relevance to Writ Petition
June 13, 2018 email exchange concerning record production issues (RA 087-094)	Metro’s Emergency Petition argues that the district court cannot ask that Metro provide pre-existing lists of records at issue (Emergency Motion, pp. 13-14; <i>id.</i> , pp. 27-28) and raises questions about the jurisdiction of the district court to oversee compliance matters. (Emergency Motion, pp. 17-21.) The emails concerning Metro’s refusals to provide basic information to the LVRJ concerning records produced (<i>e.g.</i> which officers uploaded the body cam footage provided via general public record

⁸ The one case Metro cites that does pertain to materials submitted in connection with writ proceedings—*State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 370 P.2d 672 (1962)—does not support the argument that the materials should be stricken in this writ proceeding. There, this Court struck an improper affidavit submitted by the respondent (who was a judge with the Second Judicial District Court) that criticized petitioner’s counsel and the merits of the petition. *State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 178, 370 P.2d 672, 673 (1962). Here, in contrast, as detailed above, the LVRJ is providing the Court with information “that may be essential to understand the matters set forth in the petition” consistent with NRAP 21(a)(4).

Appendix Item	Relevance to Writ Petition
	productions) and threats to take retaliatory action are pertinent to these issues and the LVRJ's argument that ongoing oversight and supervision by the district court is both legally permitted and necessary.
AviSight records that were produced on June 13, 2018 (RA 037-086)	Metro's Emergency Petition contends that the district court does not have jurisdiction to require Metro to provide clear answers regarding whether responsive records exist via certification. (Emergency Motion, pp. 21-22.) These records show that Metro may have falsely asserted that no records existed regarding 1 October-specific purchase orders were made. (PA554-555.). When the LVRJ received certain video ⁹ , it raised concerns about why Metro asserted that no purchase orders or no-bid contracts existed because it appeared that such purchase orders or no-bid contracts did in fact exist. The LVRJ had to issue another NPRA request to obtain the Avisight 1 October purchase order, which Metro did responds to. (RA037-086). Accordingly, these records are pertinent to the LVRJ's arguments that a certification that responsive records do not exist is an appropriate exercise of discretion.
The LVRJ's Supplemental Brief Regarding NRS 239.011 filed on June 1, 2018 (RA 003-036)	These issues concern the compliance matters at hand in the district court and urge against divesting the district court of jurisdiction to address ongoing matters concerning the Production Orders.

E. The Arguments Made By the LVRJ Are Properly Before This Court.

The arguments made by the LVRJ concerning whether a writ should issue are properly before the Court. Accordingly, Metro does not establish that “intertwining [the documents listed above] within its Response” or any “information or arguments

⁹ <https://www.reviewjournal.com/crime/shootings/las-vegas-police-release-more-video-from-oct-1-shooting-site/> (last accessed June 21, 2018).

on: (1) LVMPD’s May 30, 2018 production of records; (2) LVMPD’s June 6, 2018 production of records; (3) LVMPD’s June 13, 2018 production of records; and (4) LVMPD’s appeal is moot”)(Mot., p.4) merits striking.

Metro is correct that a party may not raise new issues for the first time on appeal. (Mot., p. 4 (internal citation omitted).) The basis for the rule prohibiting parties from raising issues for the first time on appeal is judicial efficiency, as allowing that practice would “lead to the inefficient use of judicial resources and allow parties to ... wait until the outcome is determined, then adding or switching to alternative arguments before the district court.” *Valley Health System, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 127 Nev. 167, 172-173, 252 P.3d 676, 679-680 (2011). However, as noted above, Metro’s Emergency Petition is not an appeal brief, but rather a petition for writ relief. A different question than that briefed below is now at hand: whether the district court exceeded its jurisdiction in requiring information from Metro so it can oversee compliance. The matters concerning compliance are not static, and the arguments made by the LVRJ properly address the issues concerning why the district court should not be divested of jurisdiction to oversee compliance and why the steps taken so far by the Court—requiring copies of existing lists of documents and a certification—were wholly proper.¹⁰ Therefore, the LVRJ’s arguments are properly before this Court and should

¹⁰ In contrast *Wynn Resorts, Limited v. Eighth Judicial Dist. Ct.*, 399 P.3d 334 (2017)

not be stricken.

III. CONCLUSION

Metro predicates its Emergency Petition on a rule aimed at promoting judicial efficiency. Yet, Metro' Petition takes the inefficient course of seeking this Court's intervention to stop the district court from taking measures it never took. Now, through its Motion to Strike, Metro has expended far more than thirty-six minutes' worth of legal work to complain about an inconsequential delay in receiving a courtesy copy of the Response. Metro also seeks an extension of time to further delay this proceeding, which is another affront to judicial efficiency. Despite the ramifications of the relief it seeks, Metro also seeks to artificially restrict what this Court can consider. This Court should deny Metro's Motion and consider the LVRJ's Response in its entirety.

DATED this the 22nd day of June, 2018.

/s/ Margaret A. McLetchie

Margaret A. McLetchie, Nevada Bar No. 10931

Alina M. Shell, Nevada Bar No. 11711

MCLETCHIE SHELL LLC

701 East Bridger Ave., Suite 520

Las Vegas, Nevada 89101

Counsel for Real Party in Interest Las Vegas Review-Journal

(cited at Mot., p. 2) declined to intervene with regard to a motion to compel, and rejected considering an alternative basis for the district court's ruling. Here, the LVRJ is not providing alternative bases but rather addressing why the district court's jurisdiction should not be limited.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REAL PARTY IN INTEREST LAS VEGAS REVIEW-JOURNAL'S RESPONSE TO PETITIONER'S MOTION TO STRIKE LAS VEGAS REVIEW-JOURNAL'S RESPONSE TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF PROHIBITION was filed electronically with the Nevada Supreme Court on the 22nd day of June, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Craig R. Anderson, Nick D. Crosby, and Jackie V. Nichols
MARQUIS AURBACH COFFING
Counsel for Petitioner,
Las Vegas Metropolitan Police Department

Joel E. Tasca and Justin A. Shiroff
BALLARD SPAHR LLP
Counsel for Real Parties in Interest,
American Broadcasting Companies, Inc., The Associated Press, Cable News Network, Inc., Chesapeake Media I, LLC, d/b/a KSNV-TV, Los Angeles Times Communications, LLC, The New York Times Company, and WP Company LLC d/b/a The Washington Post

Also courtesy copy sent via email to the following:

Craig R. Anderson: *canderson@maclaw.com*
Nick D. Crosby: *NCrosby@maclaw.com; sboggs@maclaw.com*
Jackie V. Nichols: *jnichols@maclaw.com; kbusch@maclaw.com*
Joel E. Tasca: *TASCA@ballardspahr.com*
Justin A. Shiroff: *ShiroffJ@ballardspahr.com*

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I further certify that on the 22nd day of June, 2018, a true and correct copy of the REAL PARTY IN INTEREST LAS VEGAS REVIEW-JOURNAL'S RESPONSE TO PETITIONER'S MOTION TO STRIKE LAS VEGAS REVIEW-JOURNAL'S RESPONSE TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF PROHIBITION was sent by First Class United States mail to the following:

*The Honorable Judge Stefany Miley
Eighth Judicial District Court, Dept. XXIII
200 Lewis Avenue, Twelfth Floor
Las Vegas, Nevada 89155
Respondent*

/s/ Pharan Burchfield
Employee of McLetchie Shell LLC

ADDENDUM A

From: Jackie V. Nichols <jnichols@maclaw.com>
Sent: Tuesday, May 29, 2018 6:59 AM
To: maggie; 'Shiroff, Justin A.'
Cc: pharan@nvlitigation.com; Nick Crosby; Suzanne Boggs; Krista Busch
Subject: American Broadcasting Companies, Inc., et al. v. LVMPD / Opposition to Motion for Order to Show Cause [IWOV-iManage.FID1029106]
Attachments: Respondent Las Vegas Metropolitan Police Department's Opposition to Las Vegas Review Journal's Motion for Order to Show Cause, Request to Issue Sanctions and Request for Emergency Status Check on Order Shortening Time.pdf

Maggie & Justin,

Our Opposition has not been pushed through the E-filing system yet. Attached is a courtesy copy of our Opposition.

Thank you,



Jacqueline V. Nichols, Esq.

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ADDENDUM B

From: efilimgmail@tylerhost.net
Sent: Tuesday, May 29, 2018 2:00 PM
To: EFile
Subject: Courtesy Copy of Service for Case: A-17-764030-W, American Broadcasting Companies, Inc., Plaintiff(s)vs.Las Vegas Metropolitan Police Department, Defendant(s) for filing Opposition to Motion - OPPM (CIV), Envelope Number: 2615955



Copy of Service

Case Number: A-17-764030-W
Case Style: American Broadcasting Companies, Inc., Plaintiff(s)vs.Las Vegas Metropolitan Police Department, Defendant(s)
Envelope Number: 2615955

This is a courtesy copy of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Court	Eighth Judicial District Court
Case Number	A-17-764030-W
Case Style	American Broadcasting Companies, Inc., Plaintiff(s)vs.Las Vegas Metropolitan Police Department, Defendant(s)
Envelope Number	2615955
Date/Time Submitted	5/25/2018 3:36 PM PST
Filing Type	Opposition to Motion - OPPM (CIV)
Filing Description	Respondent Las Vegas Metropolitan Police Department's Opposition to Las Vegas Review Journal's Motion for Order to Show Cause, Request to Issue Sanctions and Request for Emergency Status Check on Order Shortening Time
Filed By	Peter Floyd
Service Contacts	American Broadcasting Companies, Inc.: Las Vegas Intake (LVCTIntake@ballardspahr.com) Justin Shiroff (shiroffj@ballardspahr.com) Joel Tasca (tasca@ballardspahr.com) Richard Paredes (lvdocket@ballardspahr.com)

	Las Vegas Review-Journal: Alina Shell (alina@nvlitigation.com) Margaret McLetchie (maggie@nvlitigation.com) Other Service Contacts not associated with a party on the case: Krista Busch (kbusch@maclaw.com) Suzanne Boggs (sboggs@maclaw.com) Nicholas Crosby (ncrosby@maclaw.com) Jackie Nichols (jnichols@maclaw.com)
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